IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1646

JOHNEY BOWMAN KEARNEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI OUT OF TIME TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL CARUSO,
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ATTORNEY FOR PETITIONER

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Petitioner, Johney Bowman Kearney, respectfully prays that a Writ of Certiorari issue, out of time, to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on February 14, 1977.

Opinion Below

The Court of Appeals for the Ninth Circuit entered its opinion in this case on February 14, 1977. A copy of the Opinion, affirming this judgment of conviction is attached as Appendix "A". (The Memorandum Opinion was certified as not for publication.)

Jurisdiction

As aforestated, the judgment of the United States Court of Appeals for the Ninth Circuit (Appendix "A") was entered on February 14, 1977. On February 28, 1977, Petitioner's Application for Order Enlarging Time Within Which to File Petition for Rehearing was filed, in timely fashion; said Application prayed for an enlargement of time through March 14, 1977. On March 16, 1977, Petitioner's Application was denied. The jurisdiction of this Court is involved under Title 28 U.S.C. Section 1254(1); Section 1651(a).

This Petition for a Writ of Certiorari is herewith filed out of time due to the inordinate length of time Petitioner's Application For Enlargement of Time Within Which to File Petition for Rehearing was pending with the Court of Appeals. Although this Petition for Certiorari, then, was not filed within the thirty days allowed by Rule 22(2) of the Supreme Court Rules, this limitation is not jurisdictional (*Heflin v. United States*, 358 U.S. 415, 418, n.7, 3 L.Ed 2d 407, 410, 79 S.Ct. 451 (1959), and Petitioner prays to this Court's sense of fairness and enlightened judicial discretion which was similarly exhibited in *Taglianetti v. United States*, 394 U.S. 316, 22 L.Ed 2d 302, 89 S.Ct. 1099 (1969) and *Durham v. United States*, 401 U.S. 481, 28 L.Ed 2d 200, 91 S.Ct. 858 (1971), to grant this Petition and consider the important questions posed by this case.

Questions Presented For Review

The questions presented in light of the undisputed record are two-fold:

1. Whether an indictment which fails to allege an essential element of the offense charged is fatally defective and insufficient to sustain a conviction based upon a plea of nolo contendere; and

2. Whether a conviction based upon a plea of nolo contendere must be reversed, where the indictment fails to allege an essential element of the offense *and* the Court attempts, but fails, to properly satisfy itself of a factual basis for the plea.

Statutory Provisions Involved

The provisions of Title 18 of the United States Code, Section 1343, are printed as Appendix B, hereto.

Statement of the Case

On May 17, 1976, Petitioner in the United States District Court for the District of Arizona was convicted of one count of fraud by wire, in violation of 18 U.S.C. Section 1343; Petitioner had entered a plea of nolo contendere to said count on April 5, 1976.

The indictment, which was filed on March 19, 1975 and in seven

counts, alleged that the "defendant devised and intended to devise a scheme" by selling an "exclusive license agreement" to seven people in the United States. Count Seven, to which the plea of nolo contendere was entered, alleged that on or about May 5, 1974, Petitioner, as part of the foregoing "scheme", intended to defraud and obtain money by "false and fraudulent pretenses, representations and promises", from one Loraine Kilts of Detroit, Michigan; further, it alleged that Petitioner perpetrated his scheme by "various telephone conversations had between Defendant and Loraine Kilts."

Prior to accepting the plea, however, the Court received evidence relative to a factual basis for said plea, apparently in reliance upon requirements set forth in Rule 11, Federal Rules of Criminal Procedures.

John Hunt, a special agent with the Federal Bureau of Investigation, was called by the Government and testified as to his investigation into the facts underlying the allegations in Count seven. Agent Hunt testified that Loraine Kilts learned of the Petitioner and the "license agreement" by reading a local advertisement, wherein it was stated that the "reader should respond either . . . by letter or to a toll-free telephone number in Tempe, Arizona." Although the evidence indicated that the Arizona telephone number was listed in the advertisement, there was no evidence received reflecting whether or not Loraine Kilts ever utilized the telephone to respond to the advertisement or communicate with Petitioner.

The trial court determined that it had "heard sufficient evidence as to the Government's case", and accepted the plea.

The Court of Appeals for the Ninth Circuit, on Petitioner's direct appeal, affirmed the conviction, holding: (a) that the District Court "amply complied with the requirements" of Rule 11; (b) that "although more precise drafting of Count VII would have eliminated any issue", the indictment's allegations were sufficiently clear. The Court of Appeals, however, failed to consider whether the Government should have a sufficient factual showing for the plea, in that the "plea admitted the allegations of Count VII".

REASONS FOR GRANTING THE WRIT

A.

Petitioner respectfully urges that prior decisions of this Court dictate that a Writ of Certiorari should be granted, if for no other reason than to put to a rest the Government's practice of commencing criminal proceedings by virtue of clearly insufficient indictments.

There is nothing startling or novel in the contention that an indictment must give the accused clear notice of the charges against him. This Court has given this principle meaning, by requiring that every indictment set forth "fully, directly, and expressly, without any uncertainty or ambiguity . . . all the elements necessary to constitute the offense intended to be punished." *United States v. Carll*, 105 U.S. 611, 612, 26 L.Ed 1135 (1882). Despite the judicial evolution away from "form over substance" rules of criminal pleading, the cases have religiously held that an indictment, to be held sufficient, must, in the minimum, contain every element of the crime allegedly committed. *Hamling v. United States*, 418 U.S. 87, 117-118, 41 L.Ed 2d 590, 94 S.Ct. 2887, (1974), *United States v. Debrow*, 346 U.S. 374, 376-377, 98 L.Ed 92, 74 S.Ct. 113 (1953).

The essential elements of the federal offense of violating 18 U.S.C. Section 1343 are: (a) the formation by one of a scheme with intent to defraud; and (b) the utilization of interstate wire facilities in perpetration of that scheme *Lindsey v. United States*, 332 F.2d 688, 690 (9th. Cir. 1964). Indeed, the very gravamen of this statutory offense is the unlawful use of the interstate wires (*United States v. Garland*, 337 F. Supp. 1 (N.D. Ill. 1971).

It is undisputed that the indictment in issue failed to allege communication by interstate means to perpetrate the artifice to defraud. As such, the indictment failed to allege an essential element of the statutory offense, and thereby failed to charge Petitioner with a crime. "The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the Court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent". (*United States v. Carll, supra.*, 105 U.S. 611, 612-613, 26 L.Ed. 1135). Thus, it cannot be said

that district courts can simply infer the existence of essential elements of crimes, which are absent from the allegations of the indictment; clearer examples of violations of fundamental fairness are inconceivable. Furthermore, judicial functions hardly encompass supplementing deficiencies of the Government in sustaining its burden. This cause must be distinguished from those wherein the elements of the statutory offense are alleged in the indictment, albeit in a manner susceptible of being more definitely or precisely stated; in those settings, the accused is aware of what is intended and that which he is required to defend against.

Purely stated, the Government here has failed to allege an offense recognizable under 18 U.S.C. Section 1343 by failing to allege the use of interstate commerce by Petitioner. Accordingly, the challenged defect in pleading is not a "purely technical consideration" (*Hicks v. United States*, 173 F.2d 570 (4th Cir. 1949) *cert. denied*, 337 U.S. 945 (1949); it is, however, a "matter of substance" (*United States v. Carll, supra.*, 105 U.S. 611, 613) and mandates the granting of this Petition and the reversal of Petitioner's conviction.

Clearly, Petitioner's entry of the plea of nolo contendere did waive all non-jurisdictional defects in the proceedings (*United States v. Frankfort Distilleries*, 324 U.S. 293, 89 L.ED 951, 65 S.Ct. 661 (1945). The failure in an indictment, however, to set forth and allege an offense by omitting an essential element, is a substantive and jurisdictional defect, not curable by the entry of a nolo contendere plea (*United Brotherhood of Carpenters & Joiners v. United States*, 330 U.S. 395, 91 L.Ed 973, 67 S.Ct. 775 (1947).

B.

Petitioner acknowledges that presently, there is no authority for the proposition that prior to accepting a plea of nolo contendere, the trial court must hold a hearing to determine whether a factual basis for the plea exists; Rule 11, of the Federal Rules of Criminal Procedure, requires the district court to satisfy itself in this regard only as to the taking of guilty pleas.

The Court of Appeals below refused to consider whether the Government should have presented the Court with an evidentiary prima facie case because "Kearney's plea admitted the allegations of Count VII."

Petitioner submits that the reasoning employed by the court below missed the mark:

A plea of nolo contendere, correctly speaking, is not precisely tantamount to an admission of guilt; it is, rather, an assertion of unwillingness to contest, in its admission of each essential element of the offense *well pleaded in the indictment (United States v. Wolfson*, 52 F.R.D. 170 (3rd Cir. 1971; *Harris v. United States*, 190 F.2d 503, (10th Cir. 1951); *Tseung Chu v. Cornell*, 247 F. 2d 929 (9th Cir. 1957 *(cert. denied* 355 U.S. 892).

Thus, although Petitioner's plea in the trial court may have admitted the allegations, as charged, in the indictment, the plea constituted an admission of acts not amounting to a criminal offense.

Petitioner is not urging this court to issue a Writ of Certiorari, for a determination of whether a Rule 11 hearing should apply with the same equal force to nolo contendere pleas as it does to guilty pleas. The simple fact is that the trial court did conduct what amounted to such a hearing, thereby rendering the contention moot.

To the contrary, Petitioner is merely submitting that while the legal sufficiency of the indictment was apparent in its failure to allege a material element of the statutory offense, so, too, the purported "prima facie" case attempted by the Government through the testimony of John Hunt utterly lacked any proof of the use of interstate commerce means.

Thus, one of the two requisite elements of the statutory offense set out in 18 U.S.C. Section 1343, was neither alleged in the indictment, nor demonstrated by proof of its existence at the hearing requested by the trial court.

CONCLUSION

In view of the foregoing, Petitioner accordingly and respectfully urges that the count of the Indictment to which he entered his plea of nolo contendere, failed to charge an offense. Nor was any proof offered by the Government as to the existence of the use of interstate wire facilities by the Petitioner. Petitioner's plea, then, admitted what consisted of conduct not amounting to the statutory offense embraced in Section 1343. Basic legal principles require that Petitioner's conviction be reversed and that he be discharged from his sentence.

Petitioner respectfully urges that certiorari be granted to review the decision of the Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,
PAUL CARUSO
Attorney for Petitioner

APPENDIX A.
UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOHNEY BOWMAN KEARNEY,

Defendant-Appellant.

No. 76-2167

MEMORANDUM

[February 14, 1977]

Appeal from the United States District Court
for the District of Arizona

Before: GOODWIN and SNEED, Circuit Judges,
and EAST,* District Judge

Kearney entered a plea of nolo contendere to count VII of an indictment charging him with seven counts of violation of 18 U.S.C. §1343 (fraud by wire). The Government upon the plea dismissed the remaining counts. The District Court amply complied with the requirements of Fed. R. Crim. P. II, accepted the plea, and entered a judgment of conviction and sentence to custody with a fine.

Kearney appeals, asserting two issues on review:

(1) Was count VII of the indictment fatally defective in failing to specifically allege the use of interstate telephone facilities?

(2) After the entry of a plea of nolo contendere must the Government offer proof as to all of the elements of the charge?

We affirm.

Issue Is:

This issue was not presented to the District Court and is first presented on appeal. Kearney argues that the allegations of count VII are insufficient in that *interstate* telephone usage is not specifically alleged; hence the gist of the federal crime is not alleged and the risk of being twice put in jeopardy is present. We disagree.

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

> "The sufficiency of a criminal pleading should be determined by practical, as distinguished from purely technical considerations. Does it, under all the circumstances of the case, tell the defendant all that he needs to know for his defense, and does it so specify that with which he is charged that he will be in no danger of being a second time put in jeopardy? If so, it should be held good." *Hicks v. United States*, 173 F2d 570 (4th Cir.), *cert denied*, 337 U.S. 945 (1949).

When the allegations of an indictment are first challenged for a lack of sufficiency after judgment, the language of the indictment is to be liberally construed. If the necessary facts appear in any form or can be found by fair construction of its language, the indictment is sufficient. *Hagner v. United States*, 285 U.S. 427, 433 (1932); *United States v. Cluchette*, 465 F.2d 749, 752 (9th Cir. 1972); *Kaneshiro v. United States*, 445 F2d 1266, 1269 (9th Cir. 1971); and *Ramirez v. United States*, 318 F.2d 155, 157 (9th Cir. 1963).

The material and necessary elements of the crime delineated in § 1343 are: (1) The formation on the part of a defendant of a scheme with an intent to defraud; and (2) Use of the interstate telephone facilities in furtherance of that scheme. *Lindsey v. United States*, 332 F2d 688, 690 (9th Cir. 1964). The gist of the federal offense is the unlawful use of the interstate wire communications. *United States v. Garland*, 337 F. Supp. 1, 3 (N.D. ILL. 1971).

Admittedly count VII alleges that Kearney "in the District of Arizona, and elsewhere" devised and formed a scheme to defraud "Loraine Kilts of Detroit, Michigan." Subsection 1 of count VII specifically alleges that "[b]y various telephone conversations had between [Kearney] and Loraine Kilts, [Kearney] arranged to meet with and sell to Loraine Kilts . . ." Count VII concludes with the allegation: "In violation of Title 18, United States Code, Section 1343."

Although more precise drafting of count VII would have eliminated any issue, a fair construction of its specific allegations amply supply the missing word "interstate." This Court in *Kaneshiro, supra* dealt with a similar first on appeal challenge to an indictment which carried the allegation of a violation of a named federal criminal statute and held that the defendants "were fully apprised of the nature of the charges against them." The specific allegation of "[i]n

violation of" a named federal criminal statute grounded the District Court with jurisdiction and prevents any possible chance of a subsequent placement of Kearney in double jeopardy.

Issue 2:

We do not reach this issue of whether the Government should have made an evidentiary prima facie case following Kearney's plea of nolo contendere in the District Court for the reason that Kearney's plea admitted the allegations of count VII. *Tseung Chu v. Cornell*, 247 F.2d 929, 938 (9th Cir. 1957).

Kearney's judgment of conviction and sentence to custody and fined entered by the District Court on the 17th day of May, 1976 is affirmed.

AFFIRMED

APPENDIX "B"

18 U.S.C. Section 1343: FRAUD BY WIRE, RADIO, OR TELEVISION

Whoever, having devised or intending to devise, any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

No. 76-1640

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHNEY BOWMAN KEARNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1646

JOHNEY BOWMAN KEARNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On April 5, 1976, petitioner pleaded *nolo contendere* in the United States District Court for the District of Arizona to one count of wire fraud, in violation of 18 U.S.C. 1343.[1] He was sentenced to three years' imprisonment. The court of appeals affirmed on February 14, 1977 (Pet. App. 1-3). The petition for a writ of certiorari was not filed until April 18, 1977, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no merit to petitioner's contentions.

1. Petitioner contends (Pet. 4-5) that his conviction based upon a plea of *nolo contendere* should be reversed because the indictment failed to charge a federal offense.

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[1]Petitioner made restitution to each person defrauded (Tr. 10). The remaining six counts of the indictment were dismissed on the government's motion.

Count VII, to which petitioner pleaded *nolo contendere*, alleged that "in the District of Arizona, and elsewhere," petitioner devised a scheme to defraud "Loraine Kilts of Detroit, Michigan"; that, pursuant to this scheme, petitioner "[b]y various telephone conversations" with Ms. Kilts, arranged to meet with and sell to her an exclusive license agreement for the manufacture and sale of metal tags imprinted with the wearer's name and a toll-free telephone number through which (in the event of accident or illness) medical information about the wearer could be obtained from a computer maintained by petitioner; that petitioner agreed to furnish Kilts with equipment for the manufacture of the tags, to promote the business, and to forward to her orders from customers and her share of the profits; and that, after Kilts made a partial payment of $1,250 to petitioner for the license, she neither received the equipment nor saw or heard from him again. Count VII concluded by charging that petitioner's conduct violated the wire fraud statute, 18 U.S.C. 1343. It did not, however, use the word "interstate" in describing the telephone communications alleged to have been in furtherance of the fraud.[2]

Petitioner raised the issue of the failure of Count VII to allege the interstate element[3] for the first time on appeal. Although an indictment may be challenged for failure to state an offense at any time during the proceedings (Fed. R. Crim. P. 12(b)(2)), it is well settled

[2]Each of the remaining six counts of the indictment, which were dismissed upon petitioner's plea of *nolo contendere* to Count VII, alleged that petitioner had employed the same scheme, through "various telephone conversations," to defraud other victims residing in Michigan, Idaho, Alabama and North Carolina.

[3]As petitioner notes, use of wire or other communication facility in interstate commerce is an essential element of the offense defined by Section 1343.

that an indictment questioned for the first time on appeal will be held sufficient "unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted." *United States* v. *Trollinger*, 415 F. 2d 527, 528 (C.A. 5). See also, *e.g.*, *United States* v. *Knippenberg*, 502 F. 2d 1056, 1061 (C.A. 7). As this Court has stated, with regard to a challenge first made after a verdict of guilty had been rendered: "[N]o prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment." *Hagner* v. *United States*, 285 U.S. 427, 433.

Petitioner does not claim that he was misled by the language used in the indictment—for example, by suggesting to him that it was irrelevant whether his telephone calls to Ms. Kilts were local or interstate. In those circumstances, the only inquiry is whether the indictment may fairly be construed as alleging that petitioner placed interstate telephone calls in connection with his scheme. In this case, the indictment stated that petitioner employed "various telephone conversations" with Loraine Kilts "of Detroit, Michigan" to carry out a scheme that he devised and executed "in the District of Arizona, and elsewhere."[4] This was, we submit, a sufficient allegation of the interstate element that "fairly inform[ed] [petitioner] of the charge against which he must defend, and

[4]It has been held than an indictment that fails to allege all the elements of an offense required by statute will not be saved simply by citing the statutory section relied upon in bringing the indictment. See, *e.g.*, *United States* v. *Berlin*, 472 F. 2d 1002, 1008 (C.A. 2), certiorari denied, 412 U.S. 949. In the present case, however, there was language in addition which could reasonably be read to allege the occurrence of interstate telephone calls in furtherance of the fraudulent scheme.

* * * [will] enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling* v. *United States*, 418 U.S. 87, 117.

The present case therefore involves only the application of settled principles to a particular set of facts, and does not merit review by this Court.

2. Petitioner's contention (Pet. 5-6) that the trial court, before accepting the plea of *nolo contendere*, failed to satisfy itself that there was a factual basis for the claim that petitioner used a telephone in interstate commerce, is wholly without merit. At the plea hearing, Count VII was read aloud to petitioner, whereupon FBI Agent Hunt described the government's proof as to petitioner's fraud. He stated that Ms. Kilts became involved in petitioner's scheme by responding to an advertisement in her "local" Michigan newspaper, which listed a toll-free number in Tempe, Arizona. Thus the court was satisfied that there was a factual basis for each of the elements of the offense, including that of a telephone call in interstate commerce (Tr. 14-17).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

DOJ-1977-08